STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 19, 2000
v	No. 208362 Macomb Circuit Court
FREDRICK ROSS, a/k/a FREDERICK ROSS, Defendant-Appellant.	LC No. 97-000314-FC

Before: Cavanagh, P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), carrying a concealed weapon (CCW), MCL 750.227; MSA 28.424, and possession of a firearm during the commission of a felony, MCL 750.227b(1); MSA 28.424(2)(1). The trial court sentenced defendant to life imprisonment for the first-degree murder conviction, two to five years' imprisonment for the CCW conviction, and the mandatory consecutive term of two years' imprisonment for the felony-firearm conviction. We affirm.

I

Defendant first argues that the trial court erred in denying his motion to suppress as evidence the murder weapon. Defendant contends that, because the weapon was found in his apartment following a warrantless entry by the police, this evidence constituted the fruit of an illegal arrest and was therefore inadmissible. This Court reviews for clear error the trial court's findings of historical fact in deciding a motion to suppress evidence, but we review de novo the trial court's ultimate decision regarding a motion to suppress. *People v Garvin*, 235 Mich App 90, 96; 597 NW2d 194 (1999).

The trial court found that exigent circumstances existed such that the arresting officers were not required to comply with the warrant requirement. The "exigent circumstances" exception to the warrant requirement applies "'where there is compelling need for official action

and no time to secure a warrant.'" *People v Snider*, 239 Mich App 393, 408; 608 NW2d 502 (2000), quoting *People v Blasius*, 435 Mich 573, 583, n 7; 459 NW2d 906 (1990). The police must have probable cause to believe that the premises entered contained evidence or perpetrators of the suspected crime.[1] *Blasius*, *supra* at 593; *Snider*, *supra*.

After carefully reviewing the record, we conclude that the trial court did not clearly err in determining that exigent circumstances existed to justify the warrantless entry. Although the shooting occurred at approximately 12:30 a.m. on February 3, 1997, it was nearly twelve hours later that the police learned from a witness, Darryl McGee, of defendant's involvement. The police assembled a team within a half hour of Lieutenant Krutell's interview with McGee, and the team arrived at the defendant's apartment within an hour of the interview. Krutell testified that it would have taken until late afternoon or the following morning to obtain a warrant. Krutell believed that an emergency situation existed because of the nature of the crime, because defendant might have left the apartment if the police had not acted quickly, and because defendant was presumably armed. Based on these facts, the officers had probable cause to believe that defendant had recently committed a crime and that he was in possession of evidence of the crime. Furthermore, there were specific and objective facts indicating that immediate action was necessary to prevent the imminent destruction of evidence, protect the police officers and others, and prevent the escape of a suspect. See *id*. at 412-413. Accordingly, the exigent circumstances exception to the warrant requirement applied.

Furthermore, exigent circumstances existed to justify the police in entering the apartment without an arrest warrant to arrest defendant and to seize any evidence related to the murder. Cf. *id*. at 413-414. The police reasonably concluded that defendant's armed presence in the apartment presented a danger to others and that any delay in arresting him would be unreasonable in light of the danger.[2] The facts in this case are comparable to those in *Snider*, *supra*, in which this Court stated:

> The police were confronted with what can only be classified as an emergency situation: a murder suspect, who they had every reason to believe was armed, located in a hotel room under circumstances that very probably might put the lives and safety of the others at risk. . . . [T]he trial court properly found that the police had probable cause to arrest [the defendant]. If this is so, then the . . . entry into [the room] and the ensuing search of the room and seizure of evidence was also justified . . . . [*Id*. at 414.]

Accordingly, the warrantless entry into the apartment and the seizure of the murder weapon were justified, and the trial court did not clearly err in denying defendant's motion to suppress the evidence of the gun.[3]

II

Defendant next contends that the trial court erred in refusing to exclude his statements to

the police, made at the police station several hours after his arrest. We review this issue de novo; however, we will not disturb the trial court's factual findings regarding a knowing and intelligent waiver of *Miranda*[4] rights unless that ruling is found to be clearly erroneous. *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999).

Defendant first maintains that his statements should have been suppressed as the fruits of an unlawful arrest. We disagree. Where the police entered the defendant's home without a warrant, the statements made during a subsequent custodial interrogation are nonetheless admissible if the police had probable cause to arrest the defendant before they entered his home. See *People v Dowdy*, 211 Mich App 562, 569-570; 536 NW2d 794 (1995). Here, because the police had probable cause to arrest defendant when they entered the apartment, the statements made at the police station were not the "fruits of an illegal arrest," and they were properly admitted at trial. See *id.*; *Snider*, *supra* at 415-416.

In addition, defendant contends that his incriminating statements were not voluntarily made. In determining whether a statement was voluntary, the totality of the circumstances must be considered. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). Pertinent factors include the age of the accused; his education and intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. *Id*. at 334.

Applying these factors, we hold that the trial court did not err in determining that defendant's statements to police were voluntarily made. The transcript of Krutell's tape-recorded interview with defendant indicates that Krutell advised defendant of his constitutional rights, and defendant responded that he understood his rights, and he wished to speak. Krutell and Sergeant Folson testified that no threats or promises of leniency were made to defendant, and defendant never asked to speak to a lawyer. Although defendant provided contradictory testimony, the trial court apparently found the police witnesses more believable. Questions of credibility are left to the trier of fact and will not be resolved anew by this Court. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Under the circumstances, there is no clear error.

III

Next, defendant argues that the trial court erred in refusing to instruct the jury, pursuant to CJI2d 5.12, that it could infer that the testimony of Damon Webb would have been unfavorable to the prosecution's case. This Court reviews a trial court's denial of a request for a "missing witness" instruction for an abuse of discretion. See *People v Burwick*, 450 Mich 281, 298; 537 NW2d 813 (1995).

Before its amendment in 1986, MCL 767.40; MSA 28.980 "was interpreted to require the prosecutor to use due diligence to endorse and produce all res gestae witnesses." *Burwick*, *supra* at 287. However, the statute has been amended, and

> [t]he prosecutor's only burden of production is to produce those witnesses it intends to call, a list that can be amended on good cause shown, *at any time.* While the prosecutor has a continuing duty to give notice of all known res gestae witnesses and to advise the defendant of the witnesses it will produce, it is the defendant's responsibility to determine which witnesses it wants produced at trial. [*Id*. at 292.]

In the present case, the prosecutor's final witness list, filed several weeks before trial, did not include Webb. Krutell testified that Webb had been uncooperative and that he claimed to have no memory of the events in question. Krutell further testified that, immediately after defense counsel indicated that he wished to call Webb, Krutell began attempting to locate Webb. Four trips were made by the police to Webb's last known address in Detroit; phone calls were made to Macomb County Jail and Wayne County Jail to determine if he were incarcerated; computer checks were done to find out what address the Secretary of State had for him; and Webb's mother was told that the police were looking for him.[5] Under the circumstances, the prosecutor gave reasonable assistance in attempting to locate Webb, and the trial court did not abuse its discretion in refusing to provide a missing witness instruction. See *id*. at 290-291.

IV

Defendant also contends that the trial court erred in admitting into evidence an autopsy photograph depicting the decedent's wound. The decision to admit or exclude photographs is within the sole discretion of the trial court. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995).

Admission of gruesome photographs solely to arouse the sympathies or prejudices of the jury may be error requiring reversal. *People v Ho*, 231 Mich App 178, 188; 585 NW2d 357 (1998). However, a photograph that is otherwise admissible for some proper purpose is not rendered inadmissible because of its gruesome details or the shocking nature of the crime. *Id*. The proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice. *Mills*, *supra* at 76.

The photograph in the instant case, depicting a single bullet wound in the back of the decedent's head, was relevant to the elements of premeditation and intent. The photograph was also instructive with respect to the claims defendant appeared to make, in his statement to police, that the killing was an accident or that it was done in self-defense. See *id*. at 71. Moreover, the fact that the pathologist testified concerning the nature of the wound does not render the photograph inadmissible; photographs are not excludable simply because a witness can testify about the information contained in the photographs, as photographs may be used to corroborate a witness' testimony. See *id*. at 76, 80. We further conclude that the photograph's probative value was not substantially outweighed by the danger of unfair prejudice to defendant. Accordingly, the trial court did not abuse its discretion in admitting the photograph into evidence.

V

In addition, defendant argues that the trial court erred in permitting the pathologist, Dr. Spitz, to characterize the manner of killing as "execution style." The admission of evidence, including the admissibility of expert testimony, is reviewed for an abuse of discretion. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999).

After reviewing the record, we find no error. Spitz explained to the jury exactly what he meant by an "execution style" homicide, namely, a killing accomplished by a contact shot in the back of the head, where the victim had no defense, and death was instantaneous.[6] Spitz's characterization was fully supported by the forensic evidence. Defense counsel extensively cross-examined Spitz concerning his use of the phrase, and Spitz acknowledged that he had no knowledge regarding the state of mind of the assailant or the events preceding the killing. Under these circumstances, the probative value of Spitz's testimony was not substantially outweighed by the danger of unfair prejudice to defendant. See MRE 403. Thus, the trial court did not abuse its discretion in allowing Spitz to opine that the killing was done "execution style." See *Murray*, *supra*.

VI

Defendant maintains that his convictions of both carrying a concealed weapon and felony-firearm in the same trial are prohibited by the Double Jeopardy Clauses of the United States and Michigan Constitutions.[7] This contention is meritless in light of *People v Sturgis*, 427 Mich 392, 410; 397 NW2d 783 (1986), in which our Supreme Court held that felony-firearm and concealed weapon offenses are distinct offenses which may be separately punished in a single trial when the concealed weapon offense is not the predicate of the felony-firearm offense. Because the felony-firearm conviction against defendant was not based on the CCW charge, but instead on the murder conviction, there is no double jeopardy violation. See *id.* at 405-406.

VII

Defendant further claims that his Fifth Amendment rights were violated when the prosecutor asked Sergeant Folson whether defendant had "elect[ed] as to what defense he was going to present." Specifically, defendant contends that his constitutional right to remain silent was infringed by the prosecutor's questions. We have reviewed the record, and we disagree. Although the prosecutor's questions might have been phrased in a less suggestive manner, he was trying to bring out a specific statement that defendant had made during the interview. Thus, the questions did not implicate defendant's right to remain silent because they concerned statements he had made after *waiving* his right to remain silent. "Where a defendant makes statements to the police after being given *Miranda* warnings, the defendant has not remained silent . . . ." *Avant*, *supra* at 509. Accordingly, we find no error requiring reversal.

VIII

Finally, defendant contends that the conviction of first-degree premeditated murder was against the great weight of the evidence. However, defendant did not preserve this issue by moving for a new trial in the trial court. See MCR 2.611(A)(1)(e); *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999). Because we find no evidence of manifest injustice, we decline to address this issue. See *id.*

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Brian K. Zahra

[1] Defendant does not contend that the police did not have probable cause to enter the apartment. Rather, he confines his argument to the proposition that exigent circumstances did not exist to justify the warrantless entry.

[2] In *People v Parker*, 417 Mich 556; 339 NW2d 455 (1983), our Supreme Court held that a five-hour delay between the time the police were given a description of the perpetrator and the time the defendant was arrested without a warrant in his apartment was not justified under the exigent circumstances exception. The Court, noting that the prosecutor had offered no explanation concerning the failure to obtain a warrant, held that the defendant's motion to suppress evidence seized as a result of the warrantless entry should have been granted. See *id.* at 563. At the hearing on defendant's motion to suppress in this case, defendant relied on *Parker* in arguing that the warrantless entry and arrest approximately thirteen hours after Krutell first arrived at the murder scene could not be justified under the exigent circumstances exception. However, as the prosecutor noted, the entry and arrest took place only *one* hour after Krutell first learned about defendant's involvement in the crime.

[3] We note that, because defendant had no reasonable, subjective expectation of privacy in a weapon which was in a third person's possession, he does not have standing to challenge the seizure of the murder weapon from Dennis Crawford. See *Simmons v United States*, 390 US 377, 389; 88 S Ct 967; 19 L Ed 2d 1247 (1968); *People v Zahn*, 234 Mich App 438, 446; 594 NW2d 120 (1999).

[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[5] On appeal, defendant asserts that the prosecutor's failure to produce Webb shows a "lack of diligence." Before the Supreme Court's decision in *Burwick*, this Court held that unless the prosecutor seeks to delete a witness from his witness list as provided in MCL 767.40a(4); MSA 28.980(1)(4), the prosecutor is required to exercise due diligence to produce the witness. See *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991). It is unclear whether *Wolford* is still viable in light of *Burwick*. Justice Boyle has opined that, "to the extent that opinions from the Court of Appeals have resurrected 'due diligence' as a statutory obligation, they are in error." *People v Bean*, 457 Mich 677, 694; 580 NW2d 390 (1998) (Boyle, J., concurring in part and dissenting in part).

[6] See *People v Lumsden*, 168 Mich App 286, 288; 423 NW2d 645 (1988) (describing an "execution-style" murder).

[7] US Const, Am V; Const 1963, art 1, § 15.